Supreme Court, U.S.
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No. 99-1490

In The

Supreme Court of the United States

STATE OF SOUTH DAKOTA; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota; SCOTT PODHRADSKI, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Petitioners,

v.

YANKTON SIOUX TRIBE, and its individual members; UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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REASONS FOR DENYING STATE PETITION FOR A WRIT OF CERTIORARI

In its petition, the State of South Dakota asks this Court to grant a writ of certiorari to resolve alleged conflict between the Court of Appeals' ruling and rulings of this Court and rulings of the South Dakota State Supreme Court. Specifically the State argues that this Court should determine whether the Yankton Sioux Reservation was disestablished in 1894.

Before reaching the substance of this response, the Tribe must discuss the meaning of the State's "Question Presented." While the State claims to present only one question, its seventy-two word "Question Presented" and the body of its petition presents many legal issues, including:

1. Was the Reservation disestablished?

2. Does the Reservation include the Federal Reserve?

3. Does the Reservation include allotments which are still held by Indians?

4. Did the District Court make erroneous factual findings regarding the negotiation history and intent of the 1892 agreement?

5. Did the Court of Appeals misapply a properly stated rule of law when it determined that the Reservation was diminished but not disestablished?

The Court should separately analyze each issue which the State presents, to determine if any merit review by this Court. The Tribe's position is that this Court should determine that none of the above questions meet

the criteria for Supreme Court review under this Court's Rule 10. There are two separate factors which the Court considers in determining whether to grant a writ of certiorari. The first is whether there is an actual conflict of law between Court rulings on the issue presented. The second is whether such conflict raises an issue which is of sufficient importance to become one of the few cases the Court hears each term. The State's petition does not present an actual conflict, and it does not present an issue of legal importance.

I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH A DECISION OF THE SOUTH DAKOTA SUPREME COURT

In its petition for a writ of certiorari, the State of South Dakota argues that the decision of the Court of Appeals conflicts with the decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). The *Bruguier* opinion was issued by the South Dakota Supreme Court one day after the Court of Appeals entered its opinion in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (1999) (hereinafter *Yankton II*). The basis of the State's argument is the State's claim that *Bruguier* "unanimously held that the 1894 Act disestablished the Yankton Sioux Reservation." As is plainly evident from the opinion, *Bruguier* did not so hold.

The actual holding of *Bruguier* is identical to the Court of Appeals' holding in *Yankton II*. *Bruguier's* limited holding is that the State has criminal jurisdiction over a member of the Yankton Sioux Tribe when the crime is committed on a former Indian trust allotment

that has passed to non-Indian ownership in fee simple. Identically, the Court of Appeals, in *Yankton II,* held that the State has criminal jurisdiction over tribal members on such former allotments. Although the *Yankton II* opinion has a broader reach than *Bruguier,* it simply does not conflict with *Bruguier.*

Contrary to the State's contention, the South Dakota Supreme Court did not reach out to decide issues broader than those which the case presented. The Court explicitly limited its holding to "the status of *certain lands* lying within the 1858 boundaries of the Yankton Sioux Reservation." (Emphasis added.) *Bruguier* at 365.[1] Any analysis by the Court beyond what was necessary to resolve whether the State had jurisdiction over the "certain lands" at issue is mere dicta.

The lands at issue consisted of a former Indian trust allotment, in Pickstown, South Dakota, upon which Mr. Bruguier committed a crime. Mr. Bruguier brought a habeas corpus petition, arguing that the State did not have jurisdiction over his conduct on the former allotment. The Court therefore only needed to determine jurisdiction over the land on which the offense occurred. The opinion explicitly stated that the land in question was a former trust allotment which had passed to non-Indian ownership. The State Supreme Court noted that:

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[1] Similar to the federal courts, South Dakota holds that "in determining whether any decision is an authority upon a given proposition of law, it is necessary to ascertain the exact point that was under consideration when that decision was rendered." *Cain v. Ehrler,* 153 N.W. 941 (S.D. 1915).

> The parties stipulated that the offense occurred on allotted land *to which Indian title had been extinguished*. . . . The [lower State] Court found that the place where the offense was committed lies on formerly allotted land, "the Indian title to which has been long extinguished [and] is now held in fee title by non-Indians."
>
> . . .
>
> Although a substantial portion of the site on which Pickstown rests is former allotment land, none of it is now held by the Tribe or in trust.

Id. at 366, 367. (Emphasis added.)

In rendering its holding, the State Court expressly limited its holding to former allotments. The Court wrote:

> Today we proceed further [than prior State Court holdings which limited themselves to the issue of jurisdiction of ceded lands] to decide the jurisdictional status of *former* allotments.
>
> . . .
>
> We conclude that Pickstown is not Indian country under 18 U.S.C. § 1151.

Id. at 378. (Emphasis added.)

The South Dakota Supreme Court's limited holding is identical to the holding of the Court of Appeals in *Yankton II*. There, the Court held:

> For these reasons, we hold that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton

> Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151.

Yankton II at 1030. Applying this holding to the situation at issue in *Bruguier* calls for the same result reached by the Court in *Bruguier*: because Pickstown is on allotted lands which are no longer in Indian hands, that land is not Indian Country under 18 U.S.C. § 1151, and, therefore, the State has jurisdiction over Mr. Bruguier's crime.

Perhaps because the State cannot rely upon the holding in *Bruguier* to support its petition, the State instead bases its argument upon dicta which it misinterprets. In *Bruguier*, the Court stated that the location of the criminal offense "is not situated within the boundaries of a reservation because the Yankton Sioux Reservation was *effectively terminated* by the 1894 Act." *Id.* at 378. (Emphasis added.)

The State's reliance upon this section is misplaced for three reasons. First, the above quotation is dicta. As discussed above, the *Bruguier* Court limited its holding to the issue before it, and its broader pronouncements are not the holding of the case. The Court did not need to determine whether the Reservation was disestablished to determine if it had jurisdiction over a former allotment which was owned in fee by non-Indians.[2] Under Rule 10 of this Court, the alleged conflict between a Court of Appeals' ruling and State Court's dicta is not sufficient cause to grant a writ of certiorari.

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[2] The State Court could not have exercised broader jurisdiction, as it did not have all parties necessary for such adjudication, and such adjudication would have conflicted with the ongoing federal litigation in this matter.

Secondly the State incorrectly equates the *Bruguier* Court's use of the term "effectively terminated" with use by the federal courts of the term "disestablished." The State argues that *Bruguier* conflicts with *Yankton II* because *Bruguier's* dicta says the Reservation was "effectively terminated" while *Yankton II* holds the Reservation was not disestablished or terminated.[3] The implicit premise in the State's argument is that the State Court's term "effectively terminated," is equivalent to the Court of Appeals' use of the term "disestablished."[4]

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[3] The Court in *Bruguier* did not explain why it added the qualifying term "effectively" to its dicta. Notably, in the State's petition here, it simply removed that word from its paraphrase of the State Court's discussion. The word "effectively" appears to relate to the fact that the very issue which the State wants this Court to review is of no legal or practical importance. As discussed in detail in section IV of this response, jurisdiction is based upon whether the land is "Indian Country," under 18 U.S.C. § 1151(a), (b), or (c), not whether it is Reservation. As the *Bruguier* Court noted, Indian trust allotments and the former Federal Reserve are under tribal and federal jurisdiction regardless of whether they are denominated Reservation. The State's point about whether they are Reservation does not relate to jurisdiction over land and is a purely academic issue.

[4] In both of its opinions in this matter, the Court of Appeals has noted that the State mistakenly equated the related legal concepts of diminishment and disestablishment. 188 F.3d 1010, 1017; 99 F.2d 1439,1443 n.4. The State now argues for certiorari based upon its continued failure to distinguish these legal concepts.

The State's confusion of these terms is also demonstrated by their citation to *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977) and *State v. Thompson*, 355 N.W.2d 349 for the proposition that the State Court has found the Yankton Sioux Reservation disestablished. This Court itself has stated that the holdings of *Winckler* and *Thompson* are contrary to the State's interpretation.

This implicit premise is not valid. The *Bruguier* Court clearly defines the term "terminate:"

> If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under 1151(c), then the Yankton Sioux Reservation may be considered congressionally terminated.

Bruguier at 371.

In other words, the *Bruguier* Court used "terminate" to mean that the U.S. and Tribe have jurisdiction over allotments which remained in Indian hands and the former Federal Reserve. The Court of Appeals' uses different terminology, calling the reduction in jurisdiction

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South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 358 (1998). Both *Winckler* and *Thompson* reaffirmed that "In *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182 (1973) this Court held that the Act of 1894 disestablished *that portion* of the Yankton Sioux Reservation which was ceded and sold." (Emphasis added.) *State v. Thompson*, 355 N.W.2d at 350. In *Thompson* the State Court was again using disestablish to mean diminish, and the State's petition again fails to note the distinction. *Winckler*, *Thompson*, and *Williamson* are holdings on the status of lands which were ceded in 1894, and the Court limits its holding to that issue. The *Bruguier* holding acknowledged the limitation of the prior holdings, and explicitly stated that it was going beyond the prior case law to reach the status of former allotments which passed to non-Indians. In fact *Thompson* cites with approval the discussion in *Williamson* that implies that the Yankton Sioux Reservation continues to exist. In *Williamson* the Court stated that, in 1894 the ceded lands were "severed from the Reservation," which clearly implies that the Reservation was diminished, but not disestablished.

"diminishment," *Yankton II* at 1018, but the effect is identical. Like the State Court, the Court of Appeals holds that the Tribe retains jurisdiction to 1) the land reserved from sale under section VIII of the 1894 Act, and 2) the Indian allotments which remain in Indian hands.

Use of different terminology by state and federal courts is not adequate grounds for granting a writ of certiorari. The State Court ruling clearly delineates land over which the State has jurisdiction, and that decision is identical to the Court of Appeals' ruling on that issue. There is therefore no conflict and no basis for review of that issue by this Court under this Court's Rule 10.

Third, and most important for purposes of determining whether to grant a writ of certiorari, even if the *Bruguier* Court held that the Reservation had been disestablished and the Court of Appeals did not, this would not create a conflict between the Courts with regard to jurisdiction over land. As discussed in Section IV of this response, the issue of legal consequence in this case is not whether the label "Reservation" can be attached to a small area of land in South Dakota. The Court's role in this matter is to determine jurisdiction over that land. *Yankton II* at 1017. ("The question here is one of jurisdiction"). Regardless of the label used, *Bruguier* and *Yankton II* both hold that the Tribe and U.S. have jurisdiction over the former Federal Reserve and allotments which remain in Indian hands, and that the State has jurisdiction over ceded lands and former allotments which are now in non-Indian hands. *Bruguier* at 371; *Yankton II* at 1030. As discussed in Section IV of this response even assuming the State's interpretation of *Bruguier*, the decision would not alter jurisdiction over land, and so there is no reason

to revisit the question of whether the land can be denominated "Reservation."

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *DECOTEAU V. DISTRICT COUNTY COURT*

In its petition for a writ of certiorari, the State argues that the Court of Appeals' decision is in conflict with *DeCoteau v. District County Court*, 420 U.S. 425 (1975). The State's argument, however, is not that the Court of Appeals' decision is in conflict with the law stated in *DeCoteau*. The State's contention is merely that the present case is factually indistinguishable from *DeCoteau*, and the State wants to re-litigate, before this Court, the factual distinctions found by the District Court and affirmed by the Court of Appeals. The State is incorrect. The present case has been definitively distinguished from *DeCoteau*, and this Court should not grant certiorari to re-analyze the specific facts of this case.

A. The Court of Appeals applied the correct legal test to determine whether the Yankton Sioux Reservation has been disestablished.

Under this Court's Rule 10, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Notwithstanding this clear warning, the State bases section IIA of its petition on alleged factual errors and errors in application of a properly stated rule of law. The determination of whether

the Reservation was disestablished entails an examination of multiple factors, including the understanding of the parties at the time of the agreement, the negotiations that led to the agreement, the specific provisions of the agreement, and the subsequent history of the area. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (hereinafter *Yankton I*); *Hagen v. Utah*, 114 S.Ct. 958 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). In these cases, this Court has repeatedly discussed the factors to be considered and the weight to be accorded to each factor, so that lower courts have clear guidance on how to determine if a Reservation has been disestablished. The State does not argue that this Court should overrule these cases, and there is no need for the Court to revisit this established and settled law.

In *Yankton II*, the Appellate Court stated and applied the correct legal test for determination of whether a reservation has been disestablished. Significantly, the State's petition for a writ of certiorari does not even allege that the Court of Appeals misstated the legal test. The bulk of the Court of Appeals' opinion is its detailed analysis of the application of the appropriate test to the unique facts of this case. The Court of Appeals found that some factors weighed in favor of finding the Reservation disestablished, and some factors weighed against disestablishment. The Court of Appeals' decision closely followed this Court's discussion in *Yankton I*, which noted the factors which weighed on each side of the issue, and the weight which was to be accorded those factors. In

conclusion, the Court of Appeals found that the balance tipped in favor of finding the reservation diminished, but not disestablished. The State's position is that, under the test established by prior Supreme Court case law and applied by the Court of Appeals in this case, the Court of Appeals should have arrived at a different ultimate conclusion.

The State invites the Court to grant certiorari so that this Court can reapply the same test the Appellate and District Courts applied, to see if this Court comes to the same conclusion as the lower courts. If the Court did grant certiorari, its decision on the State's petition would not establish any new law: the decision would only apply that settled law to the specific, unique facts of the 1894 Act at issue in this matter. The Supreme Court should decline the State's invitation.

B. The instant case is not one of the rare cases which this Court should review based upon an alleged misapplication of a correct legal test or alleged erroneous findings of fact.

The State bases its request for a writ of certiorari on its disagreement with the Court of Appeals' conclusions that this matter is factually and legally distinguishable from *DeCoteau*. The Court of Appeals found three factual and legal distinctions. Those differences, when applied to the applicable legal standards, do not give rise to a showing of clear and concise congressional intent to disestablish the Reservation.

The most important distinction between this matter and *DeCoteau* is that the Sisseton, but not the Yankton,

expressed a desire to terminate their reservation. *Yankton II* at 1020. The Court of Appeals' decision on this point mirrors the District Court's decision, which discussed the issue in greater detail. 14 F. Supp. 2d at 1157. As it has done throughout this appeal, the State continues to disagree with this factual finding. The State argues the factual finding is not supported by sufficient evidence and the State cites other evidence which it argues is contrary to the finding. *State's Petition for Writ of Certiorari* at 19.

The finding is not a conclusion of law, nor does the State argue that the factual finding is contrary to any precedent of this Court. Because the finding is clearly supported by evidence, this Court should not review or reverse the finding. This factual disagreement is not a basis for a writ of certiorari. It is the settled finding of this case which unequivocally distinguishes this case from *DeCoteau*.[5] Thus, the Court of Appeals correctly determined that this legally settled difference between the Lake Traverse Reservation and the Yankton Reservation weighed in favor of finding that the Yankton Reservation was not disestablished.

The Court of Appeals also found that "the content and wording of the agreements are very different, aside from the particular cession language the Supreme Court compared in *Yankton*. Compare 26 Stat. 1036-38, with 28

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[5] The Tribe's position is further that the State's question presented does not allege erroneous factual findings. Under Supreme Court rules the State therefore cannot argue that the factual finding is in error. Because the finding is amply supported, it is unnecessary to determine whether the State preserved for review the alleged erroneous factual finding.

Stat. 314-18." *Yankton II* at 1020. The State again simply disagrees with the Court of Appeals' analysis of the negotiation history, and that disagreement with the lower court's analysis does not merit review by this Court. The Court of Appeals properly assigned the appropriate weight to the unique negotiation history of the Yankton agreement.

The Court of Appeals sets forth in detail the facts upon which it based its decision, the factors it considered, the weight given to those factors, and the Court's conclusion. The decision shows that the Court took great care to properly apply the correct legal test. Under this Court's rule 10, the State's disagreement with the lower Courts' findings of facts and weighing of factors is not grounds for granting a writ of certiorari.

III. THE COURT OF APPEALS' HOLDING THAT THE RESERVATION INCLUDES LAND RESERVED FROM SALE BY THE U.S. IN 1894 IS CONSISTENT WITH *YANKTON I*

In section IIB of its petition, the State argues that *Yankton I* held that the 1,000 acres[6] of land reserved by the United States in 1894 for agency purposes was not

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[6] In its petition for a writ of certiorari, the Tribe uniformly used acreage estimates by the Court of Appeals in *Yankton II*. The Court of Appeals estimated a Federal Reserve of up to 6,000 acres. The Tribe will hereinafter use the State estimate of a 1,000 acre Federal Reserve, as that estimate appears closer to the actual acreage. *See* 14 F. Supp. 2d 1154 (Federal Reserve of 1,252.89 acres. A July 27, 1892 letter stated that the Federal Reserve was 852 acres.)

part of the Reservation. The Tribe ceded these 1,000 acres to the U.S. under the 1894 agreement, with the understanding that:

> Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes.

28 Stat. 314-318, Article VIII.[7]

The State mistakenly argues that the 1,000 acres were "ceded" as that term is used in the following holding of this Court: "We now reverse the Eighth Circuit's decision and hold that the unallotted lands ceded as a result of the 1894 Act did not retain reservation status." *Yankton I* at 342. While the State's argument appears, at first blush, to be valid, this is only because the State fails to distinguish between the two uses of the word "ceded" in *Yankton I*. Depending on the context, this Court used the term "ceded" to mean: 1) the land ceded under Article I of the 1894 Act; or 2) the surplus land opened for settlement.

In *Yankton I*, this Court sometimes used the term "ceded land" to refer to the land which was ceded and then put up for sale as surplus property. For example, the Court wrote, "President Cleveland issued a proclamation opening the ceded lands to settlement as of May 21, 1895,

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[7] The legally accurate way to describe this transaction is that, prior to 1894, the lands were held by the U.S. as tribal trust, and that from 1894 to 1929, the lands were held by the U.S. as reserved land. In 1894, the Tribe transferred some of their interest in the land to the United States.

and non-Indians rapidly acquired them." *Id.* at 339. In the above quotation, the Court obviously did not mean that "ceded land" included the 1,000 acres ceded by the Tribe but retained by the federal government under Article VIII. The 1,000 acre Federal Reserve was not opened for settlement.

In the present matter, the Court of Appeals had to determine which of the meanings of "ceded land" this Court meant in the holding relied upon by the State. The Court of Appeals' holding is a clarification of an ambiguity in *Yankton I*. The issue raised is not relevant to disestablishment of the reservation and is not contrary to the quoted holding in *Yankton I*, and so is not grounds for a writ of certiorari.

IV. THE ISSUES RAISED IN THE STATE PETITION FOR A WRIT OF CERTIORARI LACK BROAD IMPORTANCE

A. The issue raised by the State does not affect jurisdiction over land.

The State's petition for a writ of certiorari primarily raises a theoretical question with regard to a small amount of land in a remote, sparsely populated area of the United States. The issue which the State raises lacks significant practical importance to anyone other than Yankton Sioux tribal members.[8] The question presented

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[8] The issue is of cultural or psychological importance to the Tribe. To the Tribe, there is a large difference between having a Reservation and not having a Reservation, even though that distinction does not affect jurisdiction or any tangible right.

by the State of South Dakota is "whether an 1894 statute . . . disestablished the Yankton Sioux Reservation." The importance of this litigation, since its inception, has been that the parties are asking the federal courts to determine which sovereign has jurisdiction over the lands which were the Yankton Sioux Reservation prior to 1894. Jurisdiction is not mentioned in the State's question presented, because the issues raised by the State do not bear upon which sovereign has jurisdiction. In its decision, the Court of Appeals determined that trust allotments which remain in Indian hands are part of the Reservation, and that the former Federal Reserve is part of the Reservation.[9] As discussed below, even if the Court were to grant the writ of certiorari, reverse the factual findings of the trial Court, reweigh the factors under the legal standard applied by the Court of Appeals, and then agree with the State that the Reservation was disestablished, federal and tribal jurisdiction would be the same as under the current Court of Appeals' ruling.

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[9] The Court remanded for determination of whether lands held by Indians in fee remain part of the Reservation, and left open other legal issues related to the status of lands which passed to non-Indians in manners other than as intended by Congress in 1894. The issues which the Court of Appeals remanded are not yet ripe for review, and are not included as issues in the State's petition. Because the Court of Appeals left several issues as yet unresolved and not ripe for Supreme Court review, it may be appropriate to remand this matter for resolution of those issues, so that the full case would be ripe for Supreme Court review at one time, rather than, as currently appears likely, having the remanded issues presented to this Court in separate petitions for review.

Similarly, even if the Court agreed with the State's interpretation that *Bruguier v. Class* held the Reservation disestablished as that term of art is used in federal case law, jurisdiction under *Bruguier* would be identical to jurisdiction under the challenged Court of Appeals' holding.

With regard to the allotments, the issue raised by the State's petition is merely whether the U.S. and Yankton Sioux Tribe's unquestioned jurisdiction over allotments is based upon both 18 U.S.C. § 1151(a) and 18 U.S.C. § 1151(c), or whether jurisdiction is only based upon 18 U.S.C. § 1151(c). The United States has jurisdiction over Indian Country as that term is defined in 18 U.S.C. § 1151, and there is no legal distinction between the jurisdiction conferred by the three subsections of 18 U.S.C. § 1151. The statute states in full:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter [18 USCS §§ 1151 et seq.], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

There is substantial overlap between lands which qualify as Indian Country under 18 U.S.C. § 1151(a), 18 U.S.C. § 1151(b) and 18 U.S.C. § 1151(c). For example, most allotments are within the boundaries of a Reservation, and so the U.S. can assert jurisdiction over that land under 18 U.S.C. § 1151(a) and/or 18 U.S.C. § 1151(c).

In this matter, the Court of Appeals found that the allotted lands which remained in Indian hands constituted part of the Yankton Sioux Reservation, and so the Tribe had jurisdiction over those lands under 18 U.S.C. § 1151(a). It is undisputed that, even if the Reservation was disestablished, the Tribe and U.S. would still have jurisdiction over those allotments. *Yankton II* at 1017. ("The parties agree that the Tribe has jurisdiction over allotted lands still held in trust by the federal government. The State, the District, and the individual state and county officials assert, however, that this jurisdiction falls under 18 U.S.C. § 1151(c).")

There are therefore two independent bases to support the Court of Appeals' determination that the Tribe has jurisdiction over the allotted lands: 18 U.S.C. § 1151(a) and 18 U.S.C. § 1151(c). The State challenges one basis for jurisdiction, but does not challenge that the U.S. and the Tribe have jurisdiction over allotments. One basis for jurisdiction is enough, and therefore the State's petition does not raise a legal issue with regard to allotted lands. *See also, Bruguier* at 371 (Court states former Federal Reserve and allotments are within federal tribal jurisdiction under 18 U.S.C. § 1151(c), and State Court therefore does not inquire whether jurisdiction to such land could also be based upon 18 U.S.C. § 1151(a).)

Similarly, with regard to the former Federal Reserve, if the State were to prevail in the issue it seeks to present, the decision would not affect the status of the Federal Reserve: the Tribe would have jurisdiction over the Reserve. The State's argument regarding that Federal Reserve is only that it cannot be denominated Reservation, and the State concedes it is tribal trust land. As the District Court clearly held, the U.S. and Tribe have jurisdiction over that trust land regardless of whether it is "Reservation" under 18 U.S.C. § 1151(a). 14 F. Supp. 2d 1160. That decision was not appealed or reversed and it is not brought before this Court in the State's petition for a writ of certiorari. It is *res judicata*.

B. The amount of land at issue in the State's petition is small.

The Court of Appeals estimated that, under its ruling, the Reservation contains approximately 36,000 acres. As discussed above, the issue presented by the State does not affect jurisdiction, legal rights, or ownership of those 36,000 acres. The only effect of a ruling in favor of the State would be to change the label applied to 36,000 acres of land, in a remote, sparsely populated area of the United States. The label applied to such a small parcel of land is not a matter which should command the attention of this Court. Even if that label did affect jurisdiction of some or all of that small area of land, the matter would not be of sufficient importance to merit Supreme Court review.

C. The State's other allegations of potential effects do not provide cause to grant a writ of certiorari.

On pages 27-28 of its petition for a writ of certiorari, the State makes several brief allegations of possible effects of the Court of Appeals' ruling. Significantly, the State does not argue that *Yankton II* is binding or even pursuasive authority for any of the possible effects it discusses. The alleged effect is that the decision "will be argued" or "might be argued" as precedent for the various propositions, *State's Petition* at 27. Most of the State's allegations relate to the Court of Appeals' decision that the Federal Reserve is part of the Reservation. As with any Court of Appeals' opinion, *Yankton II* will have some effect on other cases. In the present matter, such effect will be less than in most other Court of Appeals' cases, because the holding does not establish any new law. It merely applies this Court's prior decision to the unique facts of the 1892 Yankton agreement. Because there are no similarly situated tribes, the complained-of holding will have very limited effect, and any effect it will have derives from this Court's cases upon which it is based.

The State wrongly alleges the Court of Appeals' decision could be used to overturn *DeCoteau's* determination that the Lake Traverse Reservation was wholly disestablished. As discussed above, the Court of Appeals cited *DeCoteau* with approval and distinguished the Yankton agreement from that in *DeCoteau*. Moreover, a Court of Appeals' decision is not precedent to overturn a settled holding of this Court.

The State similarly argues the Court of Appeals' decision could overturn this Court's decision in *Rosebud Sioux Tribe v. Kneip*. Again, *Kneip* is settled case law of this Court, cited by the Court of Appeals with approval, and involving an agreement quite different from the Yankton agreement.

The State then broadly asserts that the Court of Appeals' decision will cause tribes throughout the nation to try to have federal reserve land denominated Reservation. Under Supreme Court case law, such tribes would not be situated similarly to the Yankton Sioux Tribe. Moreover, as in the captioned matter, for any similarly situated federal reserve, the Court of Appeals' ruling would not change jurisdiction over such Reserve. As at Yankton, any similarly situated Reserve is under tribal and federal jurisdiction regardless of whether it is Reservation.

Finally, the State argues:

> [T]he suggestion of the panel that mere "trust" or "allotted" lands in diminished or disestablished reservations might retain or somehow have been revested with "reservation status" will likewise raise difficulties in every area subjected to disestablishment or diminishment.

This final paragraph of the State's petition is based upon a contortion of *Yankton II* which is far beyond the bounds of proper legal argument, and far beyond the bounds of the question they present. The Court of Appeals devoted nearly its whole opinion to discussion and application of the long-settled case law for determination of whether a Reservation which has been allotted has also been disestablished. The Court looked to

many factors besides the fact that the Reservation was allotted. The Court cited with approval *DeCoteau* (allotments not part of Reservation which was disestablished) and *Kneip* (allotments in area severed from Reservation are not part of the Reservation), both of which directly contradict what the State argues is the "suggestion of the panel." The panel did not in any way suggest that the only factor of importance was whether the reservation was allotted.

CONCLUSION

At the beginning of its relationship with non-Indians, the Yankton Sioux Tribe controlled a vast area in what is now the Midwest of the United States. By agreements, by requests, by force, by duress, by dishonest conduct, by cheating, the lands of this once powerful Tribe have been reduced to a small area of land which is within federal and tribal jurisdiction.

The State brings its petition for a writ of certiorari, asking that this Court eliminate the last vestige of the Tribe's Reservation. The State asks for disestablishment, not to increase State jurisdiction, because the State's argument does not affect jurisdiction. As stated, even if the Court agreed with the States' interpretation that *Bruguier* held the Reservation disestablished, as that term of art is used in federal case law, jurisdiction under *Bruguier* would be identical to jurisdiction under the challenged Court of Appeals' ruling. Whatever the motives of the State, the grounds stated in their petition do not meet the standard for granting a writ for certiorari by this Court.

The Court should not devote its time and energy to determine whether there are two or whether there is only one basis for federal and tribal jurisdiction over a small, remote, rural area of the United States. The Court should deny the State's petition asking the Court to disestablish the Yankton Sioux Reservation.

Respectfully submitted,

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